

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Health-Chem Corporation :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9-A of the Tax Law for :  
the Fiscal Years Ended 6/30/74 - 6/30/76. :  
:

---

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Health-Chem Corporation, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Health-Chem Corporation  
1107 Broadway  
New York, NY 10010

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
7th day of November, 1985.

David Parchuck

Annunzio Arduini  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
Health-Chem Corporation :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9-A of the Tax Law :  
for the Fiscal Years Ended 6/30/74 - 6/30/76. :  
:

---

AFFIDAVIT OF MAILING

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Leon Hariton, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leon Hariton  
Touche Ross & Co.  
1633 Broadway  
New York, NY 10010

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
7th day of November, 1985.

David Parchuck

Annice O'Hanlon

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

November 7, 1985

Health-Chem Corporation  
1107 Broadway  
New York, NY 10010

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Leon Hariton  
Touche Ross & Co.  
1633 Broadway  
New York, NY 10010  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
of	:	
HEALTH-CHEM CORPORATION	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Fiscal	:	
Years Ended June 30, 1974 through June 30,	:	
1976.	:	

---

Petitioner, Health-Chem Corporation, 1107 Broadway, New York, New York 10010, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended June 30, 1974 through June 30, 1976 (File No. 47044).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 3, 1985 at 1:15 P.M., with all briefs to be submitted by May 15, 1985. Petitioner appeared by Leon Hariton, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly imposed a limitation on the accrual of interest on an overpayment of tax resulting from a net operating loss carryback where petitioner filed on a consolidated basis for federal tax purposes, but on an individual basis for state tax purposes.

FINDINGS OF FACT

1. Petitioner, Health-Chem Corporation, a Delaware corporation qualified to do business in New York, filed timely corporation franchise tax reports on an individual basis for the fiscal years ended June 30, 1974, 1975, 1976, 1977,

1978 and 1979. It reported taxable income for the fiscal years ended June 30, 1974, 1975, 1976 and 1979. Petitioner filed federal tax returns on a consolidated basis as a member of an affiliated group of corporations during each of the years in issue.

2. Petitioner carried back net operating losses incurred in 1977 and 1978 to 1974, 1975 and 1976 and filed claims for a refund. Petitioner also carried forward a portion of the loss to the fiscal year ended June 30, 1979 and filed a refund claim. The Audit Division granted petitioner's refund claims and issued refunds with interest. In computing the interest on the overpayment of tax, the Audit Division limited the amount of interest to be paid to the extent that interest ceased accruing 18 months from the close of the taxable years for which the net operating losses occurred. As a result, the Audit Division paid petitioner interest in the amount of \$14,434.59.

3. Petitioner argued that no limitation on the accrual of interest was provided for in the Tax Law and filed claims for refund of additional interest due for the fiscal years ended June 30, 1974, 1975 and 1976 totalling \$56,565.14.<sup>1</sup> The Audit Division denied petitioner's claims for refund of additional interest by a letter dated June 22, 1983, which stated in part:

"For periods ending June 1974, June 1975 and June 1976, your interest was limited to one year and six months from the end of the loss year. Section 1088(d) of the Tax Law states in part that if a claim for refund, made by a Sub Chapter "S" Corporation or a corporation which files as part of a federal consolidated group, is not filed with the Tax Department within 18 months from the close of the taxable year for which the net operating loss occurs, interest will not accrue after the conclusion of such period. Please find attach [sic] a copy of our CT-8 claim. On the back of this form, the interest limitation is stated."

---

<sup>1</sup> An additional refund of \$80.29 representing additional interest on the carryforward to 1979 was also applied for but was not raised as an issue herein.

4. The Audit Division maintains that although section 1088(d) does not specifically refer to corporations that file on a consolidated basis for federal purposes and on an individual basis for New York State purposes, the law does not authorize refunds to these corporations for the application of net operating loss carrybacks. In order to circumvent the inequities resulting from lack of authorization to allow refunds to consolidated filers for net operating loss carryback claims, the State Tax Commission ruled that the provisions that apply to corporations filing individually would also apply to those corporations that file as part of a consolidated group for federal purposes and on an individual basis for New York State purposes. The ruling eventually was incorporated in the regulations. The Audit Division later instituted a policy whereby federal consolidated filers who file individually for state purposes would be treated in the same fashion as Subchapter S corporations for the purposes of the limitation on accrual of interest under section 1088(d) of the Tax Law.

#### CONCLUSIONS OF LAW

A. That section 208.9(f) of the Tax Law allows a net operating loss deduction which is "presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code of nineteen hundred fifty-four, or which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code...". A corporation which reports as part of a consolidated group for Federal income tax purposes but on a separate basis for purposes of article 9-A computes its net operating loss deduction as if it were filing on a separate basis for Federal income tax purposes. 20 NYCRR 3-8.1(a).

B. That section 1088(d) of the Tax Law provides:

"For purposes of this section, if any overpayment of tax imposed by article nine-a results from a carryback of a net operating loss or a net capital loss, such overpayment shall be deemed not to have been made prior to the close of the taxable year in which such net operating loss or net capital loss arises. In the case of a taxpayer which has made an election under subchapter s of chapter one of the internal revenue code, where an overpayment of tax results from a carryback of a net operating loss arising in a taxable year ending on or after December thirty-first, nineteen hundred seventy-six, or from a carryback of a net capital loss arising in a taxable year ending on or after December thirty-first, nineteen hundred eighty-one, unless a claim for refund based on such overpayment has been filed within a period ending twelve months and one hundred eighty days subsequent to the last day of the taxable year in which the net operating loss or net capital loss arises, interest on any resulting refund or credit shall cease to accrue upon the conclusion of such period."

C. That the second sentence of section 1088(d) referring to Subchapter S corporations was added by Chapter 240 of the Laws of 1976. The purpose of the bill was to place Subchapter S corporations on an equal footing with other corporations subject to the franchise tax on business corporations with respect to the cutoff of interest payable on overpayments arising from net operating loss carryback deductions. The ultimate purpose of the bill was to reduce such interest payments by providing for a restriction on the right to interest similar to the one which applies to other corporations subject to the corporation franchise tax. N.Y. Legis. Ann., 1976, p. 326. Under section 6411 of the Internal Revenue Code, a corporate taxpayer may file an application for a tentative carryback adjustment on or after the date of filing of the return for the loss year and within a period of 12 months from the end of such taxable year. In the case of an application for a tentative carryback adjustment, the Internal Revenue Service must make its determination of overpayment within 90 days from the date of filing of the application or the last day of the month containing the last date prescribed by law for filing the return for the loss year, whichever is later. The taxpayer then has 90 days to file a report of changed taxable income for corporation franchise tax purposes. Tax Law §211.3.

If such report is not filed within 90 days, interest on the refund ceases to accrue after the ninetieth day. Tax Law §1087(c). Thus, non-Subchapter S corporations have, in the aggregate, 12 months and 180 days to file a claim for refund based on a carryback of a net operating loss deduction before interest ceases to accrue. Under section 1088(d), as amended, Subchapter S corporations have the same 18 month limitation.

D. That inasmuch as corporations which file as part of a consolidated group for federal purposes but separately for franchise tax purposes do not file individual applications for tentative carryback adjustments with the Internal Revenue Service, they do not come within the inherent 18 month limitation for accrual of interest as do all other non-Subchapter S corporations. Although in this regard such corporations are similar to Subchapter S corporations, consolidated federal filers which file separate State reports are not specifically included within the language of section 1088(d) of the Tax Law. However, inasmuch as under 20 NYCRR 3-8.1(a) such corporations are given the benefit of the net operating loss deduction by being allowed to compute the loss and the deduction as if they were filing on a separate basis for federal income tax purposes, they are also to be treated as if filing separate federal returns for purposes of the limitation on accrual of interest. Since, as discussed supra, corporations which file individual federal returns have an 18 month limitation on accrual of interest, corporations which are treated "as if" filing on a separate basis also have the same 18 month limitation. Therefore, it was proper for the Audit Division to impose an 18 month limitation on the accrual of interest on petitioner's overpayment of tax resulting from its net operating loss carryback.



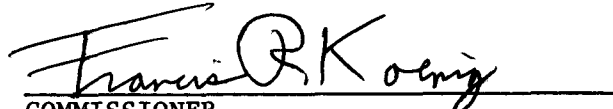
E. That the petition of Health-Chem Corporation is denied and the denial of refund of additional interest issued June 22, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER